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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-263

CHARLES GALBREATH,
Petitioner,

vs.

NEWSPAPER PRINTING CORP., ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Tennessee

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STATEMENT OF THE CASE

The Petitioner brought this class action in the Chancery Court for Davidson County, Tennessee, alleging violations of his Constitutional rights to free expression and citing a provision of the Tennessee Constitution prohibiting monopolies. The complaint alleged that the Respondents had consistently refused to publish the Petitioner's abbreviated advertisements in their classified advertising sections, and alleged in general terms that this

refusal violated the Freedom of the Press provisions of the United States and Tennessee Constitutions, and the Anti-Monopoly provision of the Tennessee Constitution.

The Respondents filed a motion for summary judgment alleging: (1) that they are private unregulated businesses, and as such have a contractual right to accept or reject advertisements, and to impose conditions upon the content of advertisements they accept; (2) that they are exempted from the operation of the anti-trust laws by the provisions of the Newspaper Preservation Act (15 U.S.C. 1801, *et.seq*), except to the extent that they engage in practices that would violate the anti-trust laws if engaged in by a single newspaper, and that the refusal of abbreviated advertisements is not such a practice; and (3) that they have a right under the First Amendment to the United States Constitution to refuse to publish advertisements which they do not desire to publish, at least to the extent that such refusals do not violate anti-trust statutes or other specific prohibitions.

The Chancery Court sustained the motion, essentially agreeing with the above contentions. The Tennessee Court of Appeals reversed, holding that the "reasonableness" of the Respondents' policy of rejecting abbreviated advertisements presented a justiciable issue. The Tennessee Supreme Court reversed the Court of Appeals' decision and affirmed the trial court, holding that the Newspaper Preservation Act exempted the Respondents from anti-trust actions except to the extent their conduct would constitute a violation of anti-trust law if engaged in by a single entity; that a policy of refusing abbreviated advertisements as alleged in the complaint did not constitute such a violation; and that the Respondents had a Constitutional and common law right to reject abbreviated advertisements if they did not desire to print them.

QUESTIONS PRESENTED

1. Whether the Newspaper Preservation Act (15 U.S.C 1801, *et seq.*) requires that newspapers acting pursuant to qualifying joint operating agreements be treated as single entities for purposes of applying the anti-trust laws.

2. Whether a newspaper, acting as a single entity, is legally entitled to adopt a policy of rejecting abbreviations in its classified advertising sections, without having the "reasonableness" of its policy subjected to judicial review.

3. Whether a prospective advertiser has a First Amendment or other right to require a newspaper to accept abbreviated advertisements, on the ground that its policy of rejecting such advertisements is "unreasonable," and increases the cost of advertising.

ARGUMENT

The petition for writ of certiorari in this case should be denied because it raises no substantial Federal question.

1. Interpretation of the Newspaper Preservation Act.

Assuming that the complaint in this case can be construed as asserting a cause of action under Federal Anti-trust statutes,[1] the Tennessee Supreme Court was clearly correct in holding that the Newspaper Preservation Act (15 U.S.C. 1801, *et seq.*) provides an absolute anti-trust exemption for these Defendants, insofar as the facts of this case are concerned. In so holding, the Court simply followed the plain wording and intent of the Act.

The clearly expressed intent of the Act was to exempt newspapers acting pursuant to qualified joint operating agreements from anti-trust actions based upon conspiracy or joint action theories. The Act was passed in 1970 in response to the decision of this Court in *Citizens Publishing Company v. United States*, 394 U.S. 131 (1968), holding that joint price-setting pursuant to a joint operating agreement was a *per se* anti-trust violation. The Newspaper Preservation Act, in effect, reversed this holding as to newspapers then operating under joint operating agreements. The Act provides that "it shall not be unlawful under any anti-trust law for any person to perform . . . any joint newspaper operating arrangement entered into prior to July

[1] The trial court generously concluded that it could, although the complaint does not refer to Federal Anti-trust statutes, and it is at least doubtful that it factually alleges a Federal Anti-trust violation.

24, 1970 . . . ." Joint operating agreements are defined in the Act as:

> "Any contract . . . entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production of the facilities are established or operated and joint or unified acts are taken or agreed to be taken with respect to one or more of the following: printing, time, method and field of publication; allocation of production facilities; distribution; *advertising solicitation;* circulation solicitation; *business departments; establishment of advertising rates*; establishment of circulation rates and revenue distribution." (emphasis added).
>
> 15 U.S.C. 1802(2).

While the above joint practices are exempted, practices that would violate the anti-trust laws if engaged in by a single entity are not exempted:

> "Nothing contained in the Chapter shall be construed to exempt from any anti-trust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any anti-trust law if engaged in by a single entity."
>
> 15 U.S.C. 1803(c).

Thus, the Act plainly exempts jointly-operated newspapers from anti-trust actions which are based upon a joint action or conspiracy theory, but leaves them subject to liability for single entity violations. The meaning of the statute and its application to the present facts is plain, and raises no substantial Federal question.[2]

[2] The Act is unambiguous on its face and its interpretation does not appear to require reference to legislative history. The legislative history does, in any case, fully support the plain language of the stat-

2. **The Respondents, Considered as a Single Entity, Have a Common Law and Constitutional Right to Reject Abbreviated Advertising, Without Having the "Reasonableness" of This Policy Subjected to Judicial Review.**

Like other private businesses, newspapers are entitled to contract for their services and to impose conditions upon furnishing them, provided they do not violate any anti-trust or other statutory prohibitions. Newspapers are generally free to accept or reject advertisements and classes of advertisements according to their own business judgment. Such judgments are not reviewable by the courts in terms of reasonableness, any more than similar judgments by other business concerns are so reviewable. The holdings of this effect have been virtually unanimous.[3]

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ute. The Senate Judiciary Committee expressly adopted the following testimonial statement concerning the meaning and effect of the Act:

> "I am saying that they [joint operating newspapers] are considered as a merger. I am wiping out any violation for getting together to fix prices. I am trying to take Tuscon and put it in the position of Phoenix. In Phoenix one owner can set prices. There is nothing illegal about setting prices. If his prices are predatory or if his prices are designed to eliminate competition or monopolize the territory then he is open to challenge in either civil or criminal litigation. The same would apply to Tuscon under this bill."
>
> Report of the Senate Judiciary Committee, 91st Cong., 1st Session, No. 91-535.

In what appears to be the only reported case involving a similar issue, the District Court for the Northern District of Indiana applied the Act precisely as it was applied by the Tennessee Supreme Court in the present case:

> "Considering the purpose of [The Newspaper Preservation Act], if a practice or conduct would be lawful if engaged in by a single newspaper entity, such conduct should not become unlawful by the mere fact that two newspapers are operating under a qualifying joint newspaper agreement."
>
> *America's Best Cinema Corp. v. Ft. Wayne Newspapers, Inc.*, 347 F. Supp. 328, 334 (N.D. Ind. 1972).

[3] *Friendenberg v. Times Pub. Co. Ltd.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie New Yorker*, 205 Misc. 982, 131 N.Y.S.2d 515 (1954); *Levinson v. The Evening Star Newspaper Co.*, 118 F. Supp. 947 (D.C. 1955); *Gordon, Inc. v. Worcester Telegram Pub. Co.*, 343 Mass. 142, 177 N.E. 2d 586 (1961); *Staff Research Assoc., Inc. v. Tribune Co.*, 345 F. 2d 372 (7th Cir. 1965); *Bloff v. Federated Pub., Inc.*, 145 N.W.2d 800; *Cf. Sharon Held Co. v. Mercer Co.*, 132 Pa. Super. 245 (1930); *Fisher v. News Journal Co.*, 21 A.2d 685 (Del. 1942); *Louis Whahl, Inc.*, 50 F.2d 254 (E.D. Mich. 1931); *Commonwealth v. Boston Transcript Co.*, 249 Mass. 477, 144 N.E. 400, 35 ALR 1 (1924); *Mark v. Costello*, 32 S. Dak. 511, 143 N.W. 950 (1913); and *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813, 87 ALR 975 (Iowa 1933). The single exception to these holdings appears to be "one [otherwise unidentified] case decided in 1919." See *Bloff v. Federated Pub., Inc.*, 145 N.W.2d 800 (1967).

Moreover, recent pronouncements by this Court indicate that Freedom of the Press includes the right not to publish, as well as the right to publish, and that newspapers have a First Amendment right to reject advertising which they do not wish to publish:

> "A newspaper is more than a passive receptacle or a conduit for news comment and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on size and content of the paper, and treatment of public issues and public officials—whether fair or unfair, constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."
>
> *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258, 41 L.Ed.2d 730, 741 (1974).

3. An Individual Has No First Amendment or Other Right to Require a Newspaper to Accept Advertising Which Is Not Acceptable in Accordance With the Paper's Established Policies on the Ground That the Policy Is Allegedly "Unreasonable."

Taking the Petitioner's factual allegations as true, and giving them the very liberal interpretation adopted by the trial court, the Petitioner is asserting that he has a legal right to purchase from the Respondents a service which they do not offer—i.e., publication of abbreviated advertisements—because such advertisements would be less expensive, and because he considers the policy of rejecting such advertisements to be "unreasonable." These allegations do not state a cause of action under any known statute or principle of law, and indeed the Petitioner has not even described his purported cause of action in such terms. To the extent that the Petitioner relies upon cases such as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), that reliance is clearly misplaced. These decisions establish that commercial expression is entitled to First Amendment protection, but do not in any way suggest that advertisers, therefore, have a First Amendment right to force their advertisements upon unwilling newspapers. Indeed, as previously noted, this Court has indicated that newspapers have a First Amendment right *not* to publish such advertisements. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). To the extent that the Petitioner has attempted to assert rights under the First Amendment to the United States Constitution, therefore, his petition plainly fails to raise a substantial Federal question.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been mailed to Mr. Charles Galbreath this 31st day of August, 1979.

Alfred H. Knight